

LAW OFFICE OF WENDI HAMMOND

7325 Augusta Circle

Plano, TX 75025

PH: (972) 746-8540

Wendi@TexasEnvironmentalLaw.net

FX: (469) 241-0430

July 13, 2009

VIA FAX: (512) 239-3311 & USPS Mail

LaDonna Castanuela

TCEQ Office of the Chief Clerk; MC 105

P.O. Box 13087

Austin, TX 78711-3087

RE: SOAH Docket No. 582-08-0861 & 582-08-4013;
TCEQ Docket No. 2007-1820-AIR & 2008-1210-AIR
Application of NRG Texas Power LLC for Proposed
Air Permit Nos. 76474 and PSD-TX-1056 & HAP-14

CHIEF CLERKS OFFICE

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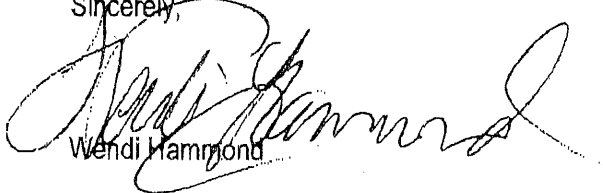
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Dear Ms. Castanuela:

Please find enclosed for filing, in the above named and numbered matter, a copy of Protestant Robertson County: Our Land, Our Lives' Exceptions to the Proposal For Decision. For timely filing, the document is being sent by facsimile as well as the original and seven copies being mailed. Likewise, copies have been served on the parties as indicated on the enclosed certificate of service.

Thank you for your attention to this matter. If you have any questions, feel free to contact me.

Sincerely,


Wendi Hammond

Encl.

CC: Certificate of Service List (w/ encl.)

**SOAH DOCKET NO. 582-08-0861 and 582-08-4013
TCEQ DOCKET NO. 2007-1820-AIR and 2008-1210-AIR**

**APPLICATION OF NRG TEXAS
POWER LLC FOR STATE AIR
QUALITY PERMIT 79188 AND
PREVENTION OF SIGNIFICANT
DETERIORATION AIR QUALITY
PERMIT PSD-TX-1072 AND
PERMIT HP-14**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARING

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CHIEF CLERK'S OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**PROTESTANT ROBERTSON COUNTY: OUR LAND, OUR LIVES'
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS:

COMES NOW Protestant Robertson County: Our Land, Our Lives (RCOLOL) and files this its exceptions to the proposal for decision (PFD). In addition to the responses specifically discussed below, RCOLOL also adopts and incorporates by reference all exceptions, arguments and supporting documents, if any, submitted on behalf of the other protestants in this matter.

For brevity, RCOLOL focuses on major exceptions to the proposal for decision. This document in no way is to be construed as a limit on or waiver of issues that may be raised in a future motion for rehearing necessary for a court appeal of the final order, findings of fact and conclusions of law that may be adopted by the Commissioners.

I. NETTING DEMONSTRATION

While Protestant generally agrees with the PFD conclusion that the Applicant failed to meet the federal requirements for a netting demonstration, Protestant takes exception to the administrative law judges (ALJs) opinion that Protestant's qualitative significance argument has no merit. Specifically, the ALJs erroneously state that "[a]lthough Protestants speculate that there might be qualitative differences . . . they have offered no factual basis for believing their scenario is likely or expected, and the TCEQ has not raised such a concern."

In fact, Protestants has identified factual proof rebutting the presumption of qualitative significance. Currently, the operation of Units 1 and 2 expose the public to an actual maximum amount of emissions on an hourly, daily and monthly basis because Units 1 and 2 combined can only emit a finite amount.¹ In comparison, under the proposed annual cap, the emissions can be distributed in any manner throughout the year. Therefore, the public can periodically be exposed to significantly greater emissions on an hourly, daily and monthly basis.² Applicant's own expert provided testimony that the application and draft permit allow this to occur.³ Thus, the presumption has been rebutted. The fact that the executive director did not raise a concern prior to the hearing or afterwards does not matter. Moreover, based upon the evidence provided during the hearing, TCEQ definitely now knows (and previously should have known) to be concerned, especially since the facts provided during the hearing demonstrate the potential impact on Texas SIP attainment demonstrations for areas consistently violating the ozone NAAQS.

II. CLIMATE CHANGE

Protestant provided evidence concerning the adverse impacts of the proposed facility's emissions on climate change; however, the ALJs refused to admit this evidence into the record. The Commissioners should remand this matter back to SOAH for inclusion of this evidence for the Commissioners' statutorily required consideration of factors under other various state and federal requirements, especially section 382.024 of the Texas Health and Safety Code which is not limited to merely a BACT review of so-called "regulated" pollutants. Furthermore, the Texas statutory requirement applied before the EPA's proposed finding that climate change pollutants such as CO₂ threaten public health and welfare of current and future generations.

¹ Applicant Exhibit 11, p. 7-11.

² Transcript, Vol. 1, p. 55-59 (starting at line 14) and p. 149-156 (starting at line 10).

³ Transcript, Vol. 1, p. 156 (lines 4-18).

III. BACT CLEANER FUELS

Protestant's except to the ALJs' opinion that NRG is not required to evaluate cleaner fuels as part of its BACT analysis. The ALJ's erroneously rely upon the Commission's previous decisions in *Oak Grove* and *Sandy Creek* that applicants need not consider of other electric generation technologies, such as integrated gasification/combined cycle technology, in their BACT analysis. Specifically, the ALJs current opinion and the past TCEQ decisions contradict the 11th Circuit Court's decision in *Sierra Club v. Environmental Protection Agency*, 499 F.3d 653,656 (11th Cir. 2007)(explaining that EPA's decision to grant the permit not because EPA thinks that burning low-sulfur coal would require the redesign of the proposed plant, but because receiving coal from a distant mine would require the proposed plant to be reconfigured as one that is not co-located with a mine (i.e., a mine-mouth coal plant) and this reconfiguration would constitute a redesign). (See Attachment A – a copy of the court's decision).

IV. NAAQS FOR OZONE

Protestant excepts to the ALJs opinion that the Commissioners' past decisions that a small amount of ozone contribution is insignificant and *de minimis* has been upheld on appeal. This in fact is not the case.

The most recent ruling from the Amarillo District Court merely concluded that "nothing in the record of the *Sandy Creek* case indicated that the TCEQ intended to or did create a rule of general applicability."⁴ Of course nothing in the *Sandy Creek* record would show that TCEQ or Applicants are generally applying the rule because *Sandy Creek* was the first case TCEQ created and applied a "measureable by monitor" *de minimis* standard for ozone.

⁴ *Blue Skies Alliance v. TCEQ*, No. 07-07-0306-CV (Ct. App. – Amarillo [7th Dist], April 14, 2009)(withdrawing the opinion of January 29, 2009).

However, the record in this case demonstrates that TCEQ did in fact illegally attempt to create a rule of general applicability that TCEQ and Applicants have been applying ever since TCEQ's *Sandy Creek* Final Order. The Executive Director and Applicant concede that TCEQ generally applied the standard in the *Oak Grove* matter, and both clearly believe that the rule should be generally applied in this case as well. Thus, the Amarillo Court's ruling has no precedential value to, and in fact undermines, TCEQ's blind adherence to the *Sandy Creek* decision.

The Limestone Unit 3 project will not be protective of the public's health, welfare and physical property because, *inter alia*, the proposed emissions from Unit 3 will contribute to air pollution in violation of the national ambient air quality standard (NAAQS) for ground level ozone in a downwind air quality control region.

The following facts are undisputed:

- Unit 3 will add at least 0.07 ppb of ozone to a monitor in Ellis County, Texas.⁵
- Ellis County, Texas is classified as nonattainment for the previous 8-hour ozone NAAQS of 85 ppb (otherwise known as .08 ppm).⁶ Also, EPA has not issued final full approval of TCEQ's attainment demonstration for the 85 ppb ozone NAAQS.⁷
- EPA revised the 8-hour ozone NAAQS to a lower 75 ppb standard (otherwise known as .075 ppm), which became effective May 27, 2008.⁸ Also, EPA has instructed TCEQ to consider the impact from proposed PSD permitted plants on the attainment of the new 2008 8-hour ozone standard.⁹
- Ellis County has air pollution in excess of the 75 ppb 8-hour ozone NAAQS standard, and TCEQ is recommending that Ellis County remain classified as nonattainment.¹⁰

⁵ Applicant's Ex. 6, NRG 000654.

⁶ RCOLOL Ex. 18, p.2 -3.

⁷ Approval and Promulgation of Air Quality Implementation Plans; Texas; Attainment Demonstration for the Dallas/Fort Worth 1997 8-hour Ozone Nonattainment Area, 74 Fed.Reg. 1903 (Jan. 14, 2009).

⁸ National Ambient Air Quality Standards for Ozone, 73 Fed.Reg. 16436 (Mar. 27, 2008).

⁹ RCOLOL Ex. 24, p. 3 (first bullet).

¹⁰ RCOLOL Ex. 15.

- The Air Quality Analysis Report submitted as part of the State Air Quality/PSD Application included a demonstration made using the. TCEQ's guidance follows the Scheffe Tables procedures and calculates a VOC/NOx ration which, if it is less than 2, requires no further modeling effort. EPA specifically stated that the Scheffe method or similar screening processes are not EPA-approved methods and in conflict with PSD requirements including, but not limited to, 40 C.F.R. §52.21(k) which requires that the source impact analysis demonstrate that emissions will not cause of contribute to air pollution in violation of any NAAQS in any air quality control region.¹¹
- Applicant's expert, Dr. Tesche, conducted additional CAMx photochemical modeling. Dr. Tesche concluded that the emissions from proposed Limestone Unit 3 will add at least 0.07 ppb of ozone to the Ellis County nonattainment area by conducting CAMx photochemical modeling.
- The draft permit allows anywhere up to 192 tons per day.¹² In the model, Dr. Tesche assumed Limestone Unit 3 would emit 560 lbs/hr, an equivalent of NOx of 6.72 tons per day.¹³ Dr. Tesche did not even know how the 560 lbs/hr figure used in the model was derived.¹⁴
- After determining that Limestone Unit 3 will add at least 0.07 ppb of ozone to the Ellis County nonattainment area, Dr. Tesche applied a policy interpretation to conclude that the 0.07 ppb increase in ozone will not contribute to air pollution in the Ellis County nonattainment area.¹⁵ Dr. Tesche admits that his application of this policy interpretation in a PSD permitting realm has never been scrutinized.¹⁶ Rather his experience stems from application of this policy interpretation under a separate provision of the Clean Air Act related to only attainment demonstrations.¹⁷
- EPA and TCEQ had previously concluded that a 2.8 tons per day NOx emission reduction at a plant located nearly 120 miles away from the Dallas-Fort Worth nonattainment area contributes to improving the area's ambient ozone air quality.¹⁸
- Dr. Tesche was unaware that EPA had previously clarified to TCEQ that no de minimis impact level for ozone exists and the definition of 2 ppb used by Dr.

¹¹ RCOLOL Exhibit 27, pp. 3 (see, Comment No. 8); Sierra Club Exhibit 36, p. 7-8 (Comment No. 27); 40 C.F.R. §52.21(k).

¹² Transcript, Vol.4, p.914, line 25 – p. 915, line 5.

¹³ Transcript, Vol. 3, p. 16 line 16 – 21.

¹⁴ Transcript, Vol. 3, p.534, ln. 5-15.

¹⁵ Transcript, Vol.3, p.497, ln. 14-23.

¹⁶ Transcript, Vol. 3, p. 493, line 17 – p. 494, line 19.

¹⁷ *Id.* at p. 496 – 497.

¹⁸ RCOLOL Ex.17 (71 Fed. Reg. 48870, 48875 (Aug. 22, 2006)).

Tesche should not be used as a limit for PSD significance limit for impacts from individual sources.¹⁹ Moreover, EPA's comments to TCEQ regarding 40 C.F.R. 52.21(k), EPA has never instructed an applicant or TCEQ to apply the policy interpretation used for Attainment Demonstrations under a separate CAA provision.²⁰

A. Background of PSD permitting provision for "cause or contribute" demonstration

The purpose of the PSD program is to protect public health and welfare from any actual or potential adverse effect which may reasonably be anticipated to occur from air pollution, notwithstanding attainment and maintenance of all NAAQS. 42 U.S.C. §7470(1). The PSD permitting program assures that any decision to permit increased air pollution in an attainment area "is made only after careful evaluation of all the consequences of such a decision" and after "opportunities for informed public participation" in the decision making process. 42 U.S.C. § 7470(5) (emphasis added).

The PSD program imposes a regime governing areas designated as attainment or unclassifiable. 42 U.S.C. §7471. The PSD program imposes permitting requirements for any "major emitting facility" defined to include facilities which has the capability to emit more than 100 tons per year of any air pollutant such as ozone forming pollutants.²¹ 42 U.S.C. §§7475, 7479(1). Failure to comply with those permitting requirements dictates that "[n]o major emitting facility . . . may be constructed." 42 U.S.C. §7475.

Approval of a state SIP is based upon an EPA determination that the state plan meets certain requirements of the federal CAA and EPA rules. 40 C.F.R. § 52.02(a). The Texas SIP has been approved by EPA and includes specific rules concerning permit applications, including

¹⁹ Transcript Vol. 3, p.510 (line 22) – 511 (line 4); Sierra Club Exhibit 36 (last page, next to last paragraph)

²⁰ Sierra Club Ex. 36, pp.7.

²¹ As explained in the Statement of Facts section of this brief, ozone forming pollutants include nitrogen oxides (NOx) or volatile organic compound (VOC).

a Prevention of Significant Deterioration (PSD) air permit that is at issue in this matter. 40 C.F.R. § 52.2270. In Texas, TCEQ is the state agency generally charged with protection of air quality and the issuance of air permits. See, e.g., Tex. Health & Safety Code Ann. §§ 382.011(a)(2) & (3), .012, .017, .019, & .039. TCEQ may not issue an air permit if there is an "indication that the emissions from the facility will contravene the intent of this chapter [the TCAA], including the protection of the public's health and physical property." Tex. Health & Safety Code § 382.0518(b)(2) & (d).

TCEQ's PSD review rules state that "[e]ach proposed new major source . . . in an attainment or unclassifiable area shall comply with the Prevention of Significant Deterioration (PSD) of Air Quality regulations promulgated by EPA." 30 TEX. ADMIN. CODE § 116.160(a). A person applying for an air quality permit shall submit to the TCEQ a permit application, copies of "all plans and specifications necessary to determine if the facility or source will comply with applicable federal and state air control statutes, rules and regulations, and the intent of the [TCAA]", and other information that TCEQ considers necessary. Tex. Health & Safety Code § 382.0515. If a proposed facility, like Limestone Unit 3, is located in an attainment area, all applicable requirements of the PSD review shall be demonstrated in the application. 30 Tex. Admin. Code § 116.111(2)(I).

One of the applicable requirements of the PSD review include a showing that the emissions will not cause or contribute to air pollution. The federal CAA's PSD permitting program provisions expressly require, *inter alia*, that the owner or operator of a facility subject to the PSD permitting requirements:

demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any . . . (B) national ambient air quality standard in any air quality control region.

42 U.S.C. §7475(a)(3)(B) (emphasis added).

EPA adopted regulations to implement this statutory provision, specifically 40 C.F.R.

§52.21(k) provides the following:

Source impact analysis. The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emission increases or reductions (including secondary sources) would not cause or contribute to air pollution in violation of: (1) any national ambient air quality standard in any air quality control region; or (2) Any applicable maximum allowable increase over the baseline concentration in any area.
40 C.F.R. § 52.21(k)(emphasis added).

The approved Texas SIP and PSD program incorporated by reference this demonstration requirement, providing that "[e]ach proposed new major source or major modification in an attainment or unclassifiable area shall comply with the Prevention of Significant Deterioration (PSD) of Air Quality regulations promulgated by the EPA in Title 40 Code of Federal Regulations (CFR) at 40 CFR §52.21." 30 TEX. ADMIN. CODE § 116.160. Furthermore, TCEQ rules state that:

The commission may not issue a permit to any new major stationary source or major modification located in an area designated as attainment or unclassifiable, for any National Ambient Air Quality Standard (NAAQS) under FCAA §107, if ambient air impacts from the proposed source would cause or contribute to a violation of any NAAQS.

In order to obtain a permit, the source must reduce the impact of its emissions upon air quality by obtaining sufficient emission reductions to eliminate the predicted exceedances of the NAAQS.

A major source or major modification will be considered to cause or contribute to a violation of a NAAQS when the emissions from such source or modification would, at a minimum, exceed the de minimis impact levels specified in §101.1 at any locality that is designated as nonattainment or is predicted to be nonattainment for the applicable standard.
30 Tex. Admin. Code §116.161 (emphasis added).

A de minimis impact level for ozone simply does not exist. See, 30 Tex. Admin. Code §101.1(25). When EPA promulgated the de minimis exceptions adopted by TCEQ at 30 Tex. Admin. Code 101(25), several public commenters requested that EPA provide specific quantification as to the incremental level of pollution that would be considered as contributing to an existing violation. In response, EPA provided "significance levels" which are generally based on the Class I prevention of significant deterioration (PSD) increments contained in section 163 of the FCAA. Thus, EPA established de minimis exceptions such that a new or modified source will not be considered to cause or contribute to a violation of an NAAQS if the air quality impact is less than the "specified significance levels". 44 Fed. Reg. 3274, 3277 (January 16, 1979). EPA limited the exceptions to specified criteria pollutants (SO₂, particulate matter, NO₂, and CO). 43 Fed. Reg. 26380, 26398 (June 19, 1978). EPA clearly stated that "significance increments are not specified for photochemical oxidants" (i.e., VOCs and NO_x which are emitted by the source and chemically form ozone). 44 Fed. Reg. 3274, 3277 (January 16, 1979). This remains EPA's position still today.

Thus, the permit application cannot be granted unless NRG mitigates the .07 ppb ozone impact on the Dallas-Fort Worth area.

B. Applicant Improperly Relies on Prior TCEQ Rulings

The fact that TCEQ has erroneously applied the law in the past, does not dictate that SOAH must continue TCEQ's bidding and violate the law in its proposal for decision.

1. No De Minimis Level for Ozone Exists and TCEQ may not Spontaneously Create a De Minimis Level for Ozone Through the Adjudicative Process.

Federal regulations and interpretations state, without any ambiguity, that EPA has "chosen to specify *de minimis* cutoffs in terms of emissions rate for applicability, BACT and air quality analysis purposes with no provisions for case-by-case demonstration of a

source's air quality impact An air quality concentration *de minimis* level for each pollutant for which measurement methods are available is included in the regulations only for the purpose of providing a possible exemption from monitoring requirements. 45 Fed. Reg. 52707 (Aug. 7, 1980)(preamble to EPA's final rules on PSD and Offset Interpretative Ruling (40 C.F.R. Part 51, Appendix S)(emphasis added).

An EPA Policy Guidance memo discusses the PSD permitting requirement that an applicant must show that the proposed source would not contribute to the violation of any NAAQS.²² It states that since any source which would affect an area where a violation already exists would, to some extent, contribute to that violation without offsets, the PSD cause or contribute requirement "on its face seems to require an applicant to obtain offsets *no matter how insignificant the contribution.*" (emphasis added).²³ Thus, in accordance with statutory requirements for rulemaking subject to public notice and comment, EPA created a rule that allows for specific exemptions to this general rule. The rule, however, does not specify an exemption for ozone. The doctrine of *expressio unis est exclusio alterius* (the expression of one thing is the exclusion of others) counsels against judicial recognition of additional exceptions.²⁴

Moreover, TCEQ does not have agency discretion to create a *de minimis* level for ozone by simply issuing an order in response to an administrative contested case hearing. As

²² See, EPA policy guidance is titled Issuance of PSD Permit to Sources Impacting Dirty and Clean Areas dated November 15, 1978, page 3, question 3. The guidance is available from EPA's website address: <http://www.epa.gov/region07/programs/artd/air/nst/nsmemos/m111578.pdf>; and a copy of the policy guidance is provided in Attachment A. Note that the policy guidance references 40 C.F.R. § 52.1(l) as published at 43 Fed. Reg. 26379, 26407 (June 19, 1978), which the current 40 C.F.R. § 52.21(k) language evolved

²³ The guidance explains further that like the PSD permitting requirements the offset ruling, as amended on January 16, 1979, applies to only major sources (i.e., source with allowable emissions equal to or greater than 100 tons per year); therefore, minor sources are exempted.

²⁴ See e.g., *Copeland v. Comm'r*, 290 F.3d 326, 334 (5th Cir. 2002); *Allstate Life Ins. Co. v. Miller*, 424 F.3d 1113, 1116 (11th Cir. 2005).

previously discussed, TCEQ is bound by EPA's interpretations and regulations concerning the PSD provisions:

In adopting the Clean Air Act, Congress designated EPA as the agency primarily responsible for interpreting the statutory provisions and overseeing their implementation by the states. The EPA must approve state programs that meet the requirements of . . . [EPA's regulations]. Conversely, EPA cannot approve programs that do not meet those requirements. However, PSD is by nature a complex and dynamic program. It would be administratively impracticable to include all statutory interpretations in the EPA regulations and the SIPs of the various states, or to amend the regulations and SIPs every time EPA interprets the statute or regulations or issues guidance regarding the proper implementation of the PSD program, and the Act does not require EPA to do so. Rather, **action by the EPA to approve this [Texas'] PSD program as part of the SIP will have the effect of requiring the state to follow EPA's current and future interpretations of the Act's PSD provisions and EPA regulations**, as well as EPA's operating policies and guidance (but only to the extent that such policies are intended to guide the implementation of t approved state PSD programs). **Similarly, EPA approval also will have the effect of negating any interpretations or policies that the State might otherwise follow to the extent they are at variance with EPA's interpretation and applicable policies.**
54 Fed.Reg. 52823, 52824 (Dec. 22, 1989)(emphasis added).

EPA has made its position clear that no de minimis ozone levels exist for ozone.

Also, TCEQ decisions concerning a PSD permit are bound by the provisions and interpretations contained in the SIP. All SIP provisions must be submitted to and adopted by EPA prior to having any force or effect on the PSD permitting process, which requires notice and opportunity for public comment. *Id.* (stating that "[o]f course, any fundamental changes in the administration of the PSD program would have to be accomplished through amendments to the regulations in 40 CFR 52.21 and 51.165, and subsequent SIP revisions). TCEQ did not undertake any of these actions prior to creating its "measurable by monitor" standard.

Courts have long held that agency rules "must be enforced as long as it stands unmodified or unrepealed. . . . An agency is bound by its own valid and subsisting rules. It is not privileged to violate these rules, nor does its action in violation of a rule confer any vested

right upon a party in whose favor it acted.”²⁵ While Amarillo Court’s *Sandy Creek* decision merely concluded the facts in that case did not establish TCEQ violating this requirement, the facts in this case do.

C. Annual Sitewide NOx Limits Fails to Solve the Contribution Problem

As discussed in RCOLOL’s previously filed Initial Closing Arguments, the Applicant’s annual sitewide NOx limit is not relevant because it does not meet the requirements for netting. Furthermore, even with the annual sitewide NOx cap, the draft permit still allows Applicant to contribute 0.07 ppb of ozone (or more) on a daily basis thereby triggering ozone violations.

While the ALJs believe they are bound by TCEQ’s prior decisions and the resulting generally applicable rule, the Amarillo Court decision places the Commissioners on notice that TCEQ’s blind adherence to its *Sandy Creek* decision is improper. Therefore, the permit should be denied because the Applicant still needs to mitigate the impacts from the proposed plant (which it did not).²⁶

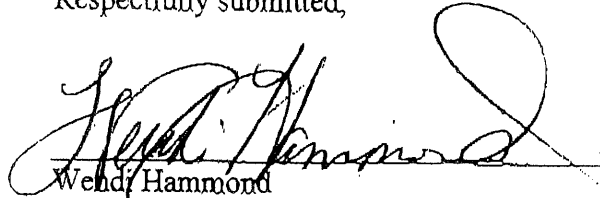
²⁵ *State v. Martin*, 347 S.W.2d 809 (Tex. App.—Austin 1961), writ refused n.r.e., (Oct. 11, 1961)(quoting 1 Tex. Jur.2d, Administrative Law, p.659, Sec. 14,)(emphasis added).

²⁶ RCOLOL’s Initial Closing Argument Filed April 4, 2009; Sierra Club Ex. 40, p. 122, ln. 13-24.

II. PRAYER

WHEREFORE, based upon the foregoing, Protestant respectfully prays that the Commissioners recommend a denial of Applicant's permit and any other remedy to which RCOLOL may be entitled.

Respectfully submitted,



Wendy Hammond
State Bar No. 24029598
7325 Augusta Cir.
Plano, TX 75025

(972) 746-8540 / (469) 241-0430 (facsimile)

ATTORNEY FOR ROBERTSON COUNTY: OUR LAND, OUR LIVES

ATTACHMENT A

Westlaw.

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499 F.3d 653, 65 ERC 1114

(Cite as: 499 F.3d 653)

Page 1

H

United States Court of Appeals,
Seventh Circuit.
SIERRA CLUB, et al., Petitioners,
v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY, Respondent,
and

Prairie State Generating Company, LLC, Intervenor-Respondent.
No. 06-3907.

Argued May 31, 2007.

Decided Aug. 24, 2007.

Rehearing and Rehearing En Banc Denied Oct. 11,
2007. ^{FN*}

FN* The Honorable Kenneth F. Ripple did not take part in the consideration or decision of this case.

Background: Environmental organizations brought action under Clean Air Act (CAA), challenging Environmental Protection Agency's (EPA) issuance of permit for coal-fired generating plant in southern Illinois.

Holdings: The Court of Appeals, Posner, Circuit Judge, held that:

- (1) CAA provision requiring that air pollution sources be designed to have the best available control technology (BACT) for minimizing pollution was not violated by issuance of permit, and
- (2) EPA did not act unreasonably in concluding that plant was unlikely to increase the ozone level in the plant area.

Petition denied.

West Headnotes

[1] Environmental Law 149E ¶269

149E Environmental Law

149EVI Air Pollution

149Ek266 Particular Sources of Pollution

149Ek269 k. Power-Generating Facilities;
Utilities. Most Cited Cases

Environmental Law 149E ¶280

149E Environmental Law

149EVI Air Pollution

149Ek275 Particular Pollutants

149Ek280 k. Sulfur and Sulfur Dioxide.

Most Cited Cases

Clean Air Act provision requiring that air pollution sources be designed to have the best available control technology (BACT) for minimizing pollution was not violated by Environmental Protection Agency's (EPA) issuance of permit for coal-fired electrical generating plant located at mouth of mine which produced high-sulfur coal; requiring plant to accommodate shipments of low-sulfur coal from a more distant source would amount to requiring a redesign of the plant, which would be a change of the project's fundamental scope. Clean Air Act, §§ 165(a)(4), 169(3), 42 U.S.C.A. §§ 7475(a)(4), 7479(3).

[2] Environmental Law 149E ¶287

149E Environmental Law

149EVI Air Pollution

149Ek287 k. Ozone. Most Cited Cases

Environmental Protection Agency (EPA) did not act unreasonably, when issuing permit for mine-mouth coal-fired electrical generating plant, in concluding that plant was unlikely to increase the ozone level in the plant area, even though conclusion was based on use of the superseded 1-hour standard, where a compliance measure tailored to the new 8-hour standard had not yet been adopted; EPA was entitled to use the measure used for the 1-hour standard as a stopgap. Clean Air Act, § 165(a)(3), 42 U.S.C.A. § 7475(a)(3).

*653 Sanjay Narayan (argued), San Francisco, CA, for Petitioners.

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(Cite as: 499 F.3d 653)

Page 2

Jon M. Lipshultz (argued), Department of Justice, Environmental Defense Section, Washington, DC, for Respondent.

*654 Kevin J. Pinto, George P. Sibley, III, Harry M. Johnson, III (argued), Hunton & Williams, Richmond, VA, for Intervenor-Respondent.

Before POSNER, KANNE, and WILLIAMS, Circuit Judges.

POSNER, Circuit Judge.

The federal Environmental Protection Agency (actually, Illinois's counterpart to the EPA, exercising authority that the federal EPA had delegated to it, but we can ignore that detail) issued a permit to Prairie State Generating Company to build a 1,500-megawatt coal-fired electrical generating plant in southern Illinois, near St. Louis. Environmentalists asked the EPA's Environmental Appeals Board to reverse the issuance of the permit, and, the Board having refused, *In re Prairie State Generating Co.*, No. 05-05 (EAB Aug. 24, 2006), they renew the quarrel in this court. They claim that the EPA violated two provisions of the Clean Air Act. One requires as a condition of receiving a permit that a plant or other source of air pollution be designed to have the "best available control technology" for minimizing pollution emitted by the plant. 42 U.S.C. § 7475(a)(4). The other attaches the further condition that the plant's emissions not exceed the limits imposed by the Act's national ambient air quality standards. § 7475(a)(3). The petitioners' first claim relates to the sulfur dioxide that will be produced as a byproduct of the production of electricity by Prairie State's plant, the second to the ozone that it will produce.

The plant is to be what is called a "mine-mouth" plant because it has been sited at the location of a coal seam. The seam is believed to contain 240 million tons of recoverable coal—enough to supply the plant's fuel needs for 30 years. The siting of the plant will enable the coal to be brought by a conveyor belt, more than half a mile long, from the mine to the plant. Unfortunately, this coal has a high sulfur content. To burn low-sulfur coal Prairie State would have to arrange for it to be transported from mines more than a thousand miles away and would have to make changes in the design of the plant—specifically, the design of the plant's facilities for receiving coal. The petitioners argue that the EPA must decide whether hauling low-sulfur coal from afar would be the best available means of controlling air pollution from the plant.

The Clean Air Act defines "best available control technology" as the "emission limitation" achievable by "application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment of innovative fuel combustion techniques." 42 U.S.C. § 7479(3). A "proposed facility" that would if built be a "major emitting facility," as the proposed Prairie State plant would be, must have "the best available control technology for each pollutant subject to regulation," § 7475(4), including sulfur dioxide. The EPA's position is that "best available control technology" does not include redesigning the plant proposed by the permit applicant ("traditionally, EPA does not require a ... [permit] applicant to change the fundamental scope of its project," *In re Old Dominion Electric Cooperative*, 3 E.A.D. 779, 793 n. 38 (EPA Adm'r 1992); Environmental Protection Agency, "New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Permitting" B.13 (Draft, Oct. 1990)), unless the applicant intentionally designs the plant in a way calculated to make measures for limiting the emission of pollutants ineffectual. *In re Prairie State Generating Co.*, *supra*, slip op. at 30, 33-34. But that is not contended in this case. Another provision *655 of the Act, distinct from the one requiring adoption of the best available control technology, directs the EPA to consider "alternatives" suggested by interested persons (such as the Sierra Club) to a proposed facility. 42 U.S.C. § 7475(a)(2); see, e.g., *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 583 (EAB 1998). But

The Clean Air Act defines "best available control technology" as the "emission limitation" achievable by "application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment of innovative fuel combustion techniques." 42 U.S.C. § 7479(3). A "proposed facility" that would if built be a "major emitting facility," as the proposed Prairie State plant would be, must have "the best available control technology for each pollutant subject to regulation," § 7475(4), including sulfur dioxide. The EPA's position is that "best available control technology" does not include redesigning the plant proposed by the permit applicant ("traditionally, EPA does not require a ... [permit] applicant to change the fundamental scope of its project," *In re Old Dominion Electric Cooperative*, 3 E.A.D. 779, 793 n. 38 (EPA Adm'r 1992); Environmental Protection Agency, "New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Permitting" B.13 (Draft, Oct. 1990)), unless the applicant intentionally designs the plant in a way calculated to make measures for limiting the emission of pollutants ineffectual. *In re Prairie State Generating Co.*, *supra*, slip op. at 30, 33-34. But that is not contended in this case. Another provision *655 of the Act, distinct from the one requiring adoption of the best available control technology, directs the EPA to consider "alternatives" suggested by interested persons (such as the Sierra Club) to a proposed facility. 42 U.S.C. § 7475(a)(2); see, e.g., *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 583 (EAB 1998). But

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that provision has not been invoked by the petitioners. Only compliance with the "BACT" (best available control technology) requirement is in issue.

The Act is explicit that "clean fuels" is one of the control methods that the EPA has to consider. Well, nuclear fuel is clean, and so the implication, one might think, is that the agency could order Prairie State to redesign its plant as a nuclear plant rather than a coal-fired one, or could order it to explore the possibility of damming the Mississippi to generate hydroelectric power, or to replace coal-fired boilers with wind turbines. That approach would invite a litigation strategy that would make seeking a permit for a new power plant a Sisyphean labor, for there would always be one more option to consider. The petitioners to their credit shy away from embracing the extreme implications of such a strategy, which would stretch the term "control technology" beyond the breaking point and collide with the "alternatives" provision of the statute. But they do not suggest another stopping point.

Now it is true that a difference between this case and our nuclear hypothetical is that a plant designed to burn coal cannot run on nuclear fuel without being redesigned from the ground up, whereas Prairie State's proposed plant could burn coal transported to the plant from afar. But to convert the design from that of a mine-mouth plant to one that burned coal obtained from a distance would require that the plant undergo significant modifications—concretely, the half-mile-long conveyor belt, and its interface with the mine and the plant, would be superfluous and instead there would have to be a rail spur and facilities for unloading coal from rail cars and feeding it into the plant. See Kathryn Heidrich, "Mine-Mouth Power Plants: Convenient Coal Not Always a Simple Solution," *Coal Age*, June 2003, pp. 28, 30; Richard H. McCartney, "Bringing Coal Yards Into the 21st Century," *Power Engineering*, July 2005, p. 36.

So it is no surprise that the EPA, consistent with our nuclear hypothetical and the petitioners' concession regarding it, distinguishes between "control

technology" as a means of reducing emissions from a power plant or other source of pollution and redesigning the "proposed facility" (the plant or other source)—changing its "fundamental scope." The agency consigns the latter possibility to the "alternatives" section of the Clean Air Act, which as we said is not involved in this case. Refining the statutory definition of "control technology"—"production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment of innovative fuel combustion techniques"—to exclude redesign is the kind of judgment by an administrative agency to which a reviewing court should defer. *Environmental Defense v. Duke Energy Corp.*, --- U.S. ---, 127 S.Ct. 1423, 1434, 167 L.Ed.2d 295 (2007); *New York v. EPA*, 413 F.3d 3, 19-20 (D.C.Cir.2005); *Alabama Power Co. v. Castle*, 636 F.2d 323, 397-98 (D.C.Cir.1979).

But this opens the further and crucial question where control technology ends and a redesign of the "proposed facility" begins. As it is not obvious where to draw that line either, it makes sense to let the EPA, the author of the underlying distinction, draw it, within reason.

*656 Suppose this were not to be a mine-mouth plant but Prairie State had a contract to buy high-sulfur coal from a remote mine yet could burn low-sulfur coal as the fuel source instead. Some adjustment in the design of the plant would be necessary in order to change the fuel source from high-sulfur to low-sulfur coal, Brian Schimmoller, "Western Coal Pushes East," *Power Engineering*, Aug. 1999, http://pepei.pennnet.com/articles/article_display.cfm?article_id=36230 (visited Aug. 21, 2007), but if it were no more than would be necessary whenever a plant switched from a dirtier to a cleaner fuel the change would be the adoption of a "control technology." Otherwise "clean fuels" would be read out of the definition of such technology. At the other end of the spectrum is our nuclear hypothetical. The plant proposed in this case falls between that hypothetical example and the ex-

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ample of a plant that has alternative off-site sources of high- and low-sulfur coal respectively.

We hesitate in a borderline case, such as this, to pronounce the EPA's decision arbitrary, the applicable standard for judicial review of its granting the permit. *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 496-97, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004). The decision required an expert judgment. The petitioners' brief, though long, contains nothing about mine-mouth power stations. The petitioners pitch their case on the naked proposition that if a plant is capable-with redesign-of burning a clean fuel, it must undergo a "best available control technology" analysis. But they flinch by carving an exception for the nuclear case without explaining the principle that distinguishes it from this case. Of course there is a distinction, but it is one of degree and the treatment of differences of degree in a technically complex field with limited statutory guidance is entrusted to the judgment of the agency that administers the regulatory scheme rather than to courts of generalist judges. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Sterro Club v. EPA*, 375 F.3d 537, 539-40 (7th Cir.2004).

What must give us pause, however, is the scantiness of the Environmental Appeals Board's discussion of the difference between, on the one hand, adopting a control technology, and, on the other hand, redesigning the proposed plant, in the specific setting of this case. Here are the critical passages: "With respect to alternate sources of coal, e.g., low-sulfur western coal from Wyoming or Montana, the proposed plant is being designed and developed to burn high-sulfur Illinois coal, the locally available coal. It would be inconsistent with the scope of the project to use coal from other regions of the country. Rather, the BACT [best available control technology] determination addresses the appropriate control technology for SO₂ [sulfur dioxide] emissions associated with use of this coal at the proposed plant.... The project that must be addressed

when evaluating BACT is the project for which an application has been submitted, i.e., a proposed mine-mouth power plant. The source of coal for which the plant would be developed is a specific reserve of 240 million tons of recoverable coal, which would meet the needs of the proposed plant for more than 30 years. Accordingly, the use of a particular coal supply is an inherent aspect of the proposed project. To require an evaluation of an alternative coal supply ... would constitute a fundamental change to the project.' " *In re Prairie State Generating Co.*, *supra*, slip op. at 20-21. Alternative coal supplies would be " 'beyond the scope of the project, a power plant fueled from *657 coal delivered by a conveyor belt from an adjacent dedicated mine.' " *Id.* at 23. " 'The development of a mine-mouth power plant is an intrinsic aspect of the proposed plant, which would be developed to use a specific reserve of fuel, which is adequate for the expected life of the plant.' ...[C]onsideration of low-sulfur coal, *because it necessarily involves a fuel source other than the co-located mine*, would require Prairie State to redefine the fundamental purpose or basic design of its proposed Facility." *Id.* at 31, 36 (emphasis added).

[1] These passages might be read as merging two separate issues: the difference between low-sulfur (clean) and high-sulfur (dirty) coal as a fuel source for a power plant, and the difference between a plant co-located with a coal mine and a plant that obtains its coal from afar. The former is a difference in control technology, the latter a difference in design (or so the EPA can conclude). We think it is sufficiently clear from the passages that we have quoted from the Environmental Appeals Board's opinion, and especially from the clause that we italicized, that the Board did not confuse the two issues; that it granted the permit not because it thinks that *burning* low-sulfur coal would require the redesign of Prairie State's plant (it would not), but because *receiving* coal from a distant mine would require Prairie State to reconfigure the plant as one that is not co-located with a mine, and this reconfiguration would constitute a redesign.

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So the Board's ruling on the BACT issue must be upheld, and we move on to the ozone issue. Measuring the contribution of a power plant to atmospheric ozone is difficult because the ozone is not emitted directly by the plant; rather, it is produced by the interaction of some of the chemicals that the plant emits with sunlight. Until 2003 the EPA determined that a power plant was violating the limit on contributing to ozone in the area in which Prairie State's plant is to be located when on at least one day there was an hour in which the average concentration of ozone exceeded .12 parts per million. But that year it decided to replace the "1 hour" standard as it was called with an "8 hour" standard. The new standard looks at whether the concentration of ozone during an average 8-hour period (more precisely, a three-year average of the fourth-highest daily maximum 8-hour concentration) exceeds .08 parts per million. The agency explained that "the 8-hour standard is more protective of public health and more stringent than the 1-hour standard, and there are more areas that do not meet the 8-hour standard than there are areas that do not meet the 1-hour standard." "Proposed Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard," 68 Fed.Reg. 32,802, 32,804 (June 2, 2003) (to be codified at 40 C.F.R. Pt. 51).

[2] The concentrations measured over these intervals are not actual measurements of ozone; they are estimates based on the levels of contributing factors, the chemicals and sunlight. The formula for estimating the average ozone concentration in one hour is not necessarily applicable to the 8-hour estimate, but the EPA has yet to adopt a formula for the latter estimate. So it used the 1-hour formula not only to show compliance with the 1-hour standard but also to generate an 8-hour estimate, and it used results from earlier studies of the St. Louis area to reinforce its conclusion. From both the 1-hour formula applied to 8-hour stretches and the earlier studies, the agency concluded that Prairie State's plant would not increase the amount of ozone in the local atmosphere. As best the agency could estimate, its 1-hour measurement would turn

out to be *below* the limit of .08 parts per million that the EPA has set for the 8-hour limit.

*658 This was a plausible expectation because, as a matter of arithmetic, the emissions in the highest hour of a measurement period have to be at least as great as the emissions averaged over the highest eight hours in that period. Suppose the emissions in the highest hour are 10 parts per million, in the next highest hour 9 parts per million, then 8 parts, 7, 6, 5, 4, and 3. The average would be 6.5, which would have to be lower than the amount in the highest hour (10) unless the emissions were the same in every hour, in which event the 1-hour and the 8-hour averages would be identical. Admittedly, the example oversimplifies the case because different methods of averaging are used for the different standards. But an emissions level that satisfies the 1-hour standard is likely though not certain to satisfy the new standard as well even though the agency considers the latter to be more stringent.

The petitioners argue that the EPA simply cannot be permitted to rely on the 1-hour standard because it has been superseded by the 8-hour standard. It has; but pending adoption of a compliance measure tailored to the new standard, the agency was entitled to use the measure used for the older standard as a stopgap to demonstrate that if the plant complied with that measure it would be unlikely to violate the new standard. The petitioners do not suggest an alternative except to criticize the inference the agency drew from earlier studies. The criticisms have some merit but not enough to enable us to conclude that the agency was unreasonable in concluding that the plant is unlikely to increase the ozone level.

The petition for review is

DENIED.

C.A.7,2007.

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END OF DOCUMENT

CERTIFICATE OF SERVICE

I hereby certify that on this the 13th day of July, 2009, a true and correct copy of the foregoing has been sent by U.S. mail, facsimile and/or email (as indicated below) to the following:



Wendi Hammond

VIA: Fax & Email

Administrative Law Judge Bennett
Administrative Law Judge Broyles
State Office of Administrative Hearings
300 West 15th St.
Austin, TX 78701
PH: 512/475-4993 / FAX: 512/475-4994
craig.bennett@soah.state.tx.us
Tommy.broyles@soah.state.tx.us

VIA: Fax

State Office of Administrative Hearings
Attn: SOAH Docket Clerk
P.O. Box 13025
Austin, TX 78711-3025
PH: 512/475-4993 / FAX: 512/475-4994

VIA: Fax & Mail

LaDonna Castanuela
TCEQ Office of the Chief Clerk; MC 105
P.O. Box 13087
Austin, TX 78711-3087
PH: 512/239-3300 / FAX: 512/239-3311

VIA: Email

Garrett Arthur
Texas Commission on Environmental Quality
Office of Public Interest Counsel; MC-175
P.O. Box 13087
Austin, TX 78711-3087
PH: 512/239-5757 / FAX: 512/239-6377
garthur@tceq.state.tx.us

VIA: Fax & Email

Booker Harrison
Executive Director
Texas Commission on Environmental Quality
MC-173
P.O. Box 13087
Austin, TX 78711-3087
PH: 512/239-4113 / FAX: 512/239-0606
booharri@tceq.state.tx.us

VIA: Fax & Email

Derek McDonald
Pamela Giblin
Baker & Botts
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, TX 78701-4078
PH: 512/322-2667 / FAX: 512/322-8342 (Derek's)
PH: 512/322-2509 / FAX: 512/322-8308 (Pam's)
derek.mcdonald@bakerbotts.com
pam.giblin@bakerbotts.com

VIA: Email

Ilan Levin
Layla Mansuri
Christina Mann
Environmental Integrity Project
1002 West Ave., Ste. 300
Austin, TX 78701
PH: (512) 619-7287 (Ilan's) / (512) 786-9026 (Layla's)
FAX: (512) 479-8302
ilevin@environmentalintegrity.org
lmansuri@environmentalintegrity.org

VIA: Email

Thomas Weber
Clark Jobe
McEroy, Sullivan & Miller, LLP
P.O. Box 12127
Austin, TX 78711
PH: (512) 327-8111
FAX: (512) 327-6566
tweber@msmtb.com
cjobe@msmtb.com

VIA: Email

Charles Morgan
Rt.2 Box 92A
Buffalo, TX 75831
PH: (903) 389-5616
cemorgan75831@yahoo.com

VIA: Email

James Blackburn, Jr.
Charles Irvine
Blackburn & Carter, P.C.
4709 Austin St.
Houston, TX 77004
PH: (713) 524-1012 / FAX: (713) 524-5165
jbb@blackburncarter.com
charles@blackburncarter.co

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

LAW OFFICE OF WENDI HAMMOND

7325 Augusta Circle

Plano, TX 75025

PH: (972) 746-8540

info@TexasEnvironmentalLaw.net

FX: (469) 241-0430

FACSIMILE TRANSMITTAL SHEET

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NOTES/COMMENTS:

The Honorable Administrative Law Judge Bennett	512/475-4994
The Honorable Administrative Law Judge Broyles	512/475-4994
SOAH Docket Clerk	512/475-4994
→ TCEQ Chief Clerk	512/239-3311
Booker Harrison, TCEQ Executive Director's Office	512/239-0606
Garrett Arthur, TCEQ Office of Public Interest Office	512/239-6377
Derek McDonald, Baker Botts, Applicant NRG	512/322-8342
Christina Mann	512/479-8302
John Quinlan	512/327-6566

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TEXAS
COMMISSION
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